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Nos. 04-277 and 04-281

In the Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

R. HEWITT PATE
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

MAKAN DELRAHIM
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
General Counsel

AUSTIN C. SCHLICK
Deputy General Counsel

DANIEL M. ARMSTRONG

JACOB M. LEWIS
Associate General Counsel

NANDAN M. JOSHI
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Federal Communications Commission had impermissibly concluded that cable modem service is an "information service," without a separately regulated telecommunications service component, under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*

PARTIES TO THE PROCEEDING

The petitioners in No. 04-277 are National Cable & Telecommunications Association, Charter Communications, Inc., Cox Communications, Inc., Time Warner, Inc., and Time Warner Cable, who collectively intervened in support of respondents in the court of appeals. The petitioners in No. 04-281 are the Federal Communications Commission and the United States of America, both of which were respondents in the court of appeals.

Respondents who were petitioners in the court of appeals are: Brand X Internet LLC, the National League of Cities, the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National Association of Counties, the Texas Coalition of Cities for Utility Issues, Earthlink, Inc., GTE.Net LLC d/b/a/ Verizon Internet Solutions, Verizon Internet Services, Inc., Verizon Telephone Companies, Consumer Federation of America, Consumers Union, Center for Digital Democracy, People of the State of California *ex rel.* Bill Lockyer, the Public Utilities Commission of the State of California, Buckingham Township, Conestoga Township, East Hempfield Township, Martic Township, and Providence Township.

Respondents who were intervenors in the court of appeals below are: WorldCom, Inc., AT&T Corp., Competitive Telecommunications Association, Vermont Public Service Board, the Information Technology Association of America, Focal Communications Corporation, Vermont Public Service Board, the State of Vermont, the Vermont Department of Public Service, Utility, Cable & Telecommunications Committee of the City Council of New Orleans, Association of Communications Enterprises, the City and County of San Francisco, SBC Communications Inc., BellSouth Corporation, and BellSouth Telecommunications, Inc.

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In the Supreme Court of the United States

No. 04-277

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a)[1] is reported at 345 F.3d 1120. The declaratory ruling and notice of proposed rulemaking of the Federal Communications Commission (Pet. App. 40a-203a) is reported at 17 F.C.C.R. 4798.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. Petitions for rehearing were denied on March 31, 2004 (Pet. App. 204a-207a). On June 16, 2004,

[1] Pet. App. refers to the corrected appendix to the petition for a writ of certiorari in No. 04-281.

Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 29, 2004, and on July 20, 2004, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including August 30, 2004. The petition for a writ of certiorari in No. 04-281 was filed on August 27, 2004, and the petition for a writ of certiorari in No. 04-277 was filed on August 30, 2004. The petitions were granted and the cases were consolidated on December 3, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, are reproduced in the appendix to the petition in No. 04-281. Pet. App. 208a-213a.

STATEMENT

In the decision under review in this case, the Federal Communications Commission concluded that broadband Internet access service provided to residential subscribers over cable facilities—an offering known as "cable modem" service, see Pet. App. 86a—should be classified as an "information service" and not a "telecommunications service" subject to a variety of common-carrier regulations under Title II of the Communications Act. That conclusion was in keeping with the core federal policy in place since the 1990s of reducing regulatory impediments to the rapid deployment of broadband (*i.e.*, "high-speed") Internet access services. See Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (goal of the 1996 Act is "to promote competition and reduce regulation in order to * * * encourage the rapid deployment of new telecommunications technologies," such as the Internet). The Ninth Circuit rejected the Commission's regulatory classification without evaluating the substance of the agency's decision or applying the deferential framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, the court held that stare decisis compelled adherence to its own circuit precedent—dating from *before* the FCC decided the issue—which classified cable modem service as partly an information service and partly a telecommunications service. See *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000).

1. The Communications Act does not mention cable modem service or expressly state how the Commission should classify and regulate that service. The dispute over that classification issue centers around the interpretation of three terms in the Communications Act—"telecommunications," "telecommunications service," and "information service."

a. "Telecommunications," a basic term in the Act, is defined as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43). "Telecommunications" is thus the unaltered transmission of information. Building on the definition of "telecommunications," the Act defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46). Thus, a "telecommunications service" involves more than the mere transmission of information; it requires the "offering" of pure transmission capability "for a fee directly to the public."

Providers of interstate telecommunications service (*i.e.*, "telecommunications carriers," see 47 U.S.C.

153(44)) are generally subject to substantial regulation as common carriers under Title II of the Communications Act, 47 U.S.C. 201 *et seq.* See *Virgin Islands Tel. Corp.* v. *FCC*, 198 F.3d 921, 926-927 (D.C. Cir. 1999).[2] As Title II common carriers, telecommunications carriers generally can be held liable for damages if their rates or terms of service are later found to be unjust, unreasonable, or unreasonably discriminatory. See 47 U.S.C. 201-209. They must also comply with numerous federal obligations, such as the requirement that they contribute to federal programs that support universal service policies, see 47 U.S.C. 254, and to design their networks to ensure interconnectivity with the networks of other carriers, see 47 U.S.C. 251(a).

b. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). The Communications Act generally does not impose regulatory obligations on providers of information services. See Pet. App. 6a, 14a. The Commission does have jurisdiction over information services under Title I of the Communications Act, 47 U.S.C. 151-161, which provides the agency authority over interstate and foreign communications. See 47 U.S.C. 151, 152(a); see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-168 (1968). The Commission, however, has traditionally refrained

[2] Providers of telecommunications that offer their services on an individualized, contract basis are considered private carriers. *Virgin Islands Tel. Corp*, 198 F.3d at 926-927. Private carriers are not regulated as common carriers under Title II, although the Act authorizes the Commission to impose some Title II requirements on them, see, *e.g.*, 47 U.S.C. 254(d) (universal service contributions), and the Commission has done so, see 47 C.F.R. 54.706(b).

from exercising its Title I authority to regulate information services. See Pet. App. 138a.[3]

2. In 1998, the Commission analyzed and interpreted those statutory terms and discussed their application to Internet service providers (ISPs) in its *Universal Service Report* to Congress. *In re Federal-State Joint Bd. On Universal Serv.*, 13 F.C.C.R. 11,501 (1998). The Commission noted that a "telecommunications service" is the "offering of telecommunications for a fee directly to the public," and the item offered to the public—"telecommunications"—must be a "transmission * * * of information * * * without change in the form or content of the information as sent and received." *Id.* at 11,520 ¶ 39 (quoting 47 U.S.C. 153(43)). An information service, by contrast, generally *does* result in a change to the form or content of the transmitted information in some manner. See *id.* at 11,521 n.79 ("A service that generates, acquires, transforms, processes, retrieves, utilizes or makes available information is by definition not merely transmitting the user's informa-

[3] In the agency proceeding below, certain parties argued that cable modem service falls within an additional service category under the Communications Act—the category of "cable service." See 47 U.S.C. 522(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service"). Such a classification would subject cable modem service to franchising obligations that localities may impose on cable operators under 47 U.S.C. 541. The Commission concluded that cable modem service is not a cable service. Pet. App. 118a-132a. The Ninth Circuit affirmed that aspect of the Commission's decision. Pet. App. 21a-22a. In No. 04-460, this Court denied a cross-petition for certiorari seeking review of the court of appeals' decision that cable modem service is not a cable service. That issue is therefore not before the Court.

tion without change."). Therefore, the Commission concluded, the categories of "telecommunications service" and "information service" are "mutually exclusive." *Id.* at 11,520, 11,521, 11,530 ¶¶ 39, 43, 59. An entity offers telecommunications "only when the entity provides a transparent transmission path, and does not 'change . . . the form and content' of the information." *Id.* at 11,521 ¶ 41. An entity that instead offers subscribers the ability to acquire, store, transform, and manipulate information "via telecommunications" is not offering "telecommunications" as defined in the 1996 Act, but is instead merely *using* telecommunications to offer an information service. *Ibid.*

The Commission rejected arguments that the telecommunications component of an information service should be isolated and viewed separately as an offering of telecommunications under the Act. 13 F.C.C.R. at 11,520 ¶ 40. Instead, the Commission concluded that the determination whether a particular offering should be classified as a "telecommunications service" will depend on the "nature of the service that is being offered to consumers," *id.* at 11,530 ¶ 59, in keeping with that definitional provision's focus on the nature of the "offering * * * to the public." 47 U.S.C. 153(46). If consumers are offered "two distinct services," one consisting of "nothing more than pure transmission" and the other consisting of "enhanced functionality," the Commission concluded that the transmission service would constitute an offering of telecommunications under the Act, while the service offering enhanced functionality would be classed as an information service. *Id.* at 11,530 ¶¶ 59-60. In contrast, where consumers are offered a "mixed or hybrid service" that combines "a single information service with communications and computing components," *id.* at 11,530 ¶¶ 56, 60, that offering would be classified solely as an information service under the Act. *Id.* at 11,529 ¶¶ 56-57.

Applying the *Universal Service Report* analysis to Internet access services, the Commission determined that traditional Internet service providers (ISPs) (*i.e.*, ISPs that do not own transmission facilities but lease lines or acquire telecommunications from third parties) are information service providers under the Act, not telecommunications service providers. 13 F.C.C.R. at 11,536 ¶ 73. The Commission found that such ISPs typically offer a variety of applications and services, including Internet browsing, e-mail, and web hosting, that provide subscribers with information service capabilities, which, taken together, form an integrated Internet access service. *Id.* at 11,537 ¶ 76, 11,539 ¶ 79. The Commission recognized that the "provision of Internet access services involves data transport elements," because an ISP must "enable the movement of information between customers' own computers and the distant computers [*e.g.*, servers on the Internet] with which those customers seek to interact." See, *e.g.*, *id.* at 11,539-11,540 ¶ 80. Nonetheless, in keeping with the foregoing statutory analysis, the Commission reaffirmed its prior determination that "the 1996 Act's definition of telecommunications, which 'only includes transmissions that do not alter the form or content of the information sent,' excludes Internet access services, which 'alter the format of information through computer processing applications.'" *Id.* at 11,516 ¶ 33; see also 13 F.C.C.R. at 11,536 ¶ 73, 11,540 ¶ 80.

Moreover, the Commission explained, classifying traditional ISPs as solely providers of information services under the Communications Act ensures that they will not be subject to the regulatory obligations of common carriers. 13 F.C.C.R. at 11,540 ¶ 82. The Commission

expressed concern that imposing such obligations on traditional ISPs would "effect[] a major change in the regulatory treatment of [Internet] services" and "could seriously curtail the regulatory freedom" that the Commission considered "important to the healthy and competitive development" of the industry. *Id.* at 11,524 ¶¶ 44-45. The Commission emphasized that it would not lightly "presume that legacy regulatory frameworks" (*i.e.*, those developed in the context of traditional telephone service) are appropriate for services that take advantage of "the unique qualities of the Internet." *Id.* at 11,540 ¶ 82.

3. In the *Universal Service Report*, the Commission did not resolve the regulatory classification of "cable operators providing Internet access," 13 F.C.C.R. at 11,535 n.140, or other information service providers that provide service using their own transmission facilities, see *id.* at 11,530 ¶ 60. Likewise, in other proceedings, the Commission recognized the evolving nature of the broadband industry and declined to make definitive pronouncements concerning the regulatory classification of broadband services generally, and cable modem service in particular. See Pet. App. 43a-46a. For instance, in a proceeding involving pole attachment rates under 47 U.S.C. 224(e)(1), the Commission tentatively concluded that Internet services provided over cable facilities are not telecommunications services under the Act, but found it unnecessary to make a final decision regarding the classification of such services.[4] In

[4] See *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6794-6796 ¶¶ 33-34 (1998), aff'd in part and vacated in part *sub nom. Gulf Power* v. *FCC*, 208 F.3d 1263 (11th Cir. 2000), rev'd *sub nom.*

National Cable & Telecommunications Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002), this Court stated that the Commission had "proceeded in a sensible fashion" in electing to avoid answering "hard questions" about the proper classification of cable modem service "when easier ones are dispositive." *Id.* at 337, 338.

4. Meanwhile, the Ninth Circuit addressed the regulatory classification of cable modem service in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (2000). The Commission participated as amicus curiae and suggested that the court could resolve the specific question before it—namely, whether a local government could require a cable franchisee to provide unaffiliated ISPs access to its cable modem facilities—without deciding whether cable modem service includes a telecommunications service component. See Br. of the FCC as Amicus Curiae at 19, 31, *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000) (No. 99-35609).[5] The Ninth Circuit, however, resolved the case on the basis of its own classification of cable modem service. The

National Cable & Telecomm. Ass'n v. *Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

[5] The Fourth Circuit adopted just such a narrow approach in *MediaOne Group, Inc.* v. *County of Henrico*, 257 F.3d 356 (2001). In that case, the court addressed a challenge to a local access requirement similar to the one at issue in *Portland*. The Fourth Circuit resolved the controversy by concluding that the local access requirement was unlawful because it required the cable operator to provide a "telecommunications facility" in violation of 47 U.S.C. 541(b)(3)(D). 257 F.3d at 363. The Fourth Circuit observed that the question of the proper classification of cable modem service "is complex and subject to considerable debate" and that the "outcome will have a marked effect on the provision of Internet services." *Id.* at 365. The Fourth Circuit accordingly concluded that resolution of the classification issue should be left "to the expertise of the FCC." *Ibid.*

court rejected the mutual view of both the cable operator and the localities in *Portland* that cable modem service is a "cable service" subject to local franchising requirements under the Communications Act. See note 3, *supra*. Instead, the Ninth Circuit concluded, based on its own analysis of the Communications Act, that cable modem service is an information service to the extent the provider acts as a "conventional ISP," but a telecommunications service to the extent the provider offers Internet transmission over the cable broadband facility. 216 F.3d at 878. Because the Communications Act prohibits localities from imposing conditions on the provision of telecommunications services by cable operators, the court reasoned, the local governments' network-access condition was unlawful. *Ibid.* (citing 47 U.S.C. 541(b)(3)).

5. In September 2000, the Commission initiated a comprehensive proceeding to "develop a national legal and policy framework" to govern the classification of cable modem service." *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (*Cable Modem NOI*) 15 F.C.C.R. 19,287, 19,288 ¶ 2 (2000). In the course of that proceeding, the Commission reviewed approximately 250 comments and engaged in numerous discussions with "industry representatives, consumer advocates, and state and local government[s]." Pet. App. 9a.

On March 15, 2002, the Commission issued the declaratory ruling under review in this case, concluding that cable modem service "as it is currently offered" is neither a cable service nor a telecommunications service under the Communications Act, but solely an inter-

state information service. Pet. App. 48a; see *id.* at 88a.[6] The Commission stated that its analysis of cable modem service was "guided by several overarching principles," *id.* at 46a, including the statutory goal of encouraging "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and the Commission's policy goal of minimizing "regulatory uncertainty" and "unnecessary and unduly burdensome regulatory costs" in order to foster "investment and innovation" in broadband services. *Id.* at 47a. The Commission also sought to create "a rational framework for the regulation of competing services that are provided via different technologies" and to develop "an analytical approach that is, to the extent possible, consistent across multiple platforms." *Id.* at 48a.

With those considerations informing its analysis, the Commission concluded that cable modem service should be classified as an information service under the Communications Act and not as a telecommunications service. The Commission observed that the Communications Act "does not clearly indicate how cable modem service should be classified or regulated," and that the "technologies and business models used to provide cable modem service are * * * complex and still evolving." Pet. App. 87a. Applying the framework it had developed in the *Universal Service Report*, see *id.* at 91a-94a, the Commission determined that it should

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[6] The Commission acknowledged the inconsistency with the *Portland* decision, Pet. App. 114a, but noted that the Ninth Circuit in *Portland* had relied on a case record "that was less than comprehensive," and that the parties in *Portland* (having agreed that cable modem service should be regulated as a cable service) had not addressed the possible classification of cable modem service as an information or telecommunications service. *Id.* at 115a.

classify cable modem service as an information service because cable modem offers subscribers functions "commonly associated with Internet access." *Id.* at 93a-95a. The Commission rejected as a factual matter arguments that cable modem service, as currently provided, includes a discrete offering of telecommunications service to subscribers. *Id.* at 95a-96a. The Commission determined that the transmission component of cable modem service is not offered in a manner that renders it "separable from the data-processing capabilities of the service"; "[a]s provided to the end user[,] the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Id.* at 96a. The Commission rejected the contention that cable operators' use of their own facilities to provide cable modem service requires a different result. *Id.* at 98a.[7]

5. Various parties petitioned for review of the Commission's decision in the Third, Ninth, and D.C. Circuits. After a judicial lottery conducted under 28 U.S.C. 2112(a)(3), the Ninth Circuit was selected to review the agency's decision. Pet. App. 10a-11a. Seven petitions for review challenging the Commission's cable modem classification order were consolidated in that court.

In a per curiam opinion, the Ninth Circuit vacated the Commission's determination that cable modem

[7] In a notice of proposed rulemaking accompanying its classification decision, the Commission requested comment on whether it should use its Title I or other authority to compel cable operators to offer the transmission capabilities they use in connection with their cable modem service to unaffiliated ISPs. See Pet. App. 134a ("[W]e consider whether * * * to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly."). That rulemaking proceeding is currently pending.

service is solely an information service under the Communications Act. The court of appeals considered itself bound by stare decisis to enforce *Portland*'s classification of cable modem service as a bifurcated information and telecommunications service, notwithstanding the Commission's intervening contrary interpretation of the Act in the order on review. Pet. App. 12a-22a. The court acknowledged that the "FCC is the agency Congress has charged with the administration of the Communications Act," and that, under *Chevron*, "[w]here the agency's interpretation of the statute [it administers] is reasonable, the court must defer." *Id.* at 11a. The court, however, read Ninth Circuit case law to preclude adherence to *Chevron* here, because *Portland* itself did not involve "deferential review of [agency] decisionmaking" or expressly state that the Communications Act is ambiguous about the correct classification of cable modem service. *Id.* at 18a, 19a (citing *Mesa Verde Constr. Co.* v. *Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1134-1135 (9th Cir. 1988) (en banc)). The court concluded that *Portland* foreclosed the Commission's determination that cable modem service is solely an information service with no separate telecommunications service component. *Id.* at 21a-22a.

Judges O'Scannlain and Thomas filed concurring opinions. Judge O'Scannlain observed that the panel's adherence to stare decisis produced a "strange result": "three [Ninth Circuit] judges telling an agency acting within the area of its expertise that its interpretation of the statute it is charged with administering cannot stand—and that [the *Portland* panel's] interpretation of how the Act should be applied to a quicksilver technological environment is the correct, indeed the only, interpretation." Pet. App. 24a-25a (citation and internal quotation marks omitted). Judge O'Scannlain noted

that the panel's decision was "strikingly inconsistent with *Chevron*'s underlying principles." *Id.* at 22a (citation omitted). Nonetheless, Judge O'Scannlain joined the panel's opinion because he thought himself constrained by circuit precedent to follow *Portland*'s classification of cable modem service. *Id.* at 25a.

Judge Thomas, the author of the *Portland* opinion, stated in his separate concurrence that he would have reached the same conclusion "even if [the panel] were writing on a clean slate." Pet. App. 39a. In his view, the statute "compels the conclusion" that cable modem service is in part a telecommunications service. *Id.* at 25a.

6. On March 31, 2004, the court of appeals denied petitions for rehearing en banc, with Judge O'Scannlain voting to grant rehearing en banc. Pet. App. 205a-207a.

SUMMARY OF ARGUMENT

I. The Communications Act does not directly address the classification of cable modem service. In the face of that statutory silence, the FCC reasonably concluded after careful study that cable modem service is properly classified as an "information service," without a separately regulated "telecommunications service" component, for purposes of the Communications Act.

A. The Commission's construction follows from three basic premises: First, the Commission found that cable modem service should be classified, along with traditional ISPs, as an information service. The Commission had previously concluded that traditional forms of Internet access service generally are "information services" under the Act, because Internet access service provides the "capability" for each of the activities in the statutory definition—"generating, acquiring, storing, transforming, processing, utilizing, or making available

information," 47 U.S.C. 153(20). In this proceeding, the Commission reasonably concluded that cable modem service, which is at its heart simply another form of Internet access service, should be classified in the same way.

Second, the Commission found that, insofar as cable modem service is an information service, it is not a telecommunications service. The Commission had previously concluded that an information service (such as traditional Internet access) is not itself a telecommunications service, and indeed that the two categories are mutually exclusive. The Commission particularly noted, *inter alia*, that because "telecommunications" by definition involves "transmission * * * *without change* in the form or content" of the information transmitted, 47 U.S.C. 153(43) (emphasis added), it is better characterized as "pure transmission," whereas an information service involves the general capability for changing the form or content of information. In this proceeding, the Commission reasonably applied that conclusion to cable modem service, which, like other Internet access services, *does* involve the capability to "change * * * the form or content" of information.

Finally, the Commission reasonably concluded that cable modem service is not a combination of distinct information and telecommunications services. Under the Act, "telecommunications service" is defined exclusively as an "*offering of telecommunications* for a fee directly to the public." 47 U.S.C. 153(46) (emphasis added). Cable modem service, however, is not offered as the "pure transmission" capacity that constitutes telecommunications, because cable modem service offers subscribers such transmission capacity only in connection with the capability for corresponding "change[s] in form or content" that occur in the course

of Internet access. The Commission therefore reasonably determined that cable modem service does not involve an "offering" of telecommunications (*i.e.*, pure transmission capacity) to the public. Nothing in the Communications Act precludes that determination; Congress clearly left to the Commission the task of reasonably construing the statutory terms to achieve the goals and policies of the Act.

B. In this case, the Commission exercised the authority delegated to it by Congress to construe the Communications Act in accordance with its expert understanding of a "technical, complex, and dynamic" subject, *Gulf Power*, 534 U.S. at 339, and in furtherance of the strong federal policy of fostering the growth of broadband Internet access services. Classifying cable modem service as a telecommunications service would drastically change the regulatory environment for cable modem service. Cable modem providers would be subject to common carrier pricing and filing requirements; they would face new financial obligations, such as contributions to universal service and other funds; and they could face as well a series of new engineering and operational obligations associated with their status as telecommunications carriers. Those costs could lead them to raise prices or forego new investment, particularly in rural and underserved areas. The Commission in this case reasonably applied the relevant definitions in the Act in a manner that advances the crucial federal policy of encouraging the availability of broadband Internet access.

C. The arguments advanced by respondents below and by Judge Thomas in his concurring opinion should be rejected. Their contention that the Commission has improperly allowed cable operators to "escape" from

sue in this case is whether cable operators providing cable modem service are subject to those obligations in the first place. In addition, respondents and Judge Thomas contend that the Commission's decades-old policy requiring telephone companies to separate out their traditional common carrier offerings from their computer offerings mandates adoption of a similar policy here. But the Commission explained that its "legacy" framework developed in an era that was dominated by common carrier monopolists in the telephone industry should not be casually applied to the entirely different structure and circumstances of the modern cable modem industry, whose participants have not historically been viewed as common carriers. Nor is there any basis for concluding that Congress codified —and froze—the Commission's legacy regulatory framework when it enacted the 1996 Act.

II. The Ninth Circuit refused even to consider whether the Commission's decision was reasonable under *Chevron* standards, because it concluded instead that the Commission was obliged to follow the Ninth Circuit's own prior construction of the Communications Act in *Portland*. The Ninth Circuit's misguided no-deference view should be rejected.

Most fundamentally, the Ninth Circuit's rule is inconsistent with *Chevron*'s recognition that Congress has delegated to the agency—not the courts of appeals—the primary authority to resolve statutory ambiguities. No decision of this Court requires adoption of the Ninth Circuit's approach, which would subject a single agency decision to differing standards of review, thereby producing unseemly races to the courthouse, unnecessary conflicts in the circuits, and unfortunate situations in which (absent this Court's review) the

termined for the entire Nation by lone three-judge panels. The Ninth Circuit's partial abrogation of *Chevron* should be overturned.

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT CABLE MODEM SERVICE SHOULD BE CLASSIFIED AS AN INFORMATION SERVICE AND NOT A TELECOMMUNICATIONS SERVICE FOR PURPOSES OF THE COMMUNICATIONS ACT

As this Court has recognized, Congress was "well aware that the ambiguities it [chose] to produce" in drafting the 1996 Act "will be resolved by the implementing agency," *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999), and Congress therefore delegated to the Commission the "authority to fill gaps where the statutes are silent," *Gulf Power*, 534 U.S. at 338-339. The Commission's decision that cable modem service should be classified as an information service and not as a telecommunications service for purposes of the Communications Act is an exercise of that delegated responsibility and should be upheld as a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Commission's classification is consistent with the text of the Act, and it promotes Congress's policy goal of "encouraging the ubiquitous deployment of broadband to all Americans." 1996 Act § 706, 110 Stat. 153.

A. The Commission Reasonably Construed The Statutory Terms To Find That Cable Modem Service Is Solely An Information Service Under The Communications Act

The question presented in this case arises out of the interpretation of the Communications Act's interre-

lated definitions of three terms: "telecommunications," "telecommunications service," and "information service." In this case, the Commission reasonably and consistently construed those terms in concluding that (a) cable modem service is an information service, (b) insofar as cable modem service is an information service, it is not a telecommunications service, and (c) cable modem service does not involve distinct information and telecommunications services. The Commission's reasonable application of the Act's definitions to cable modem service should be affirmed.

1. *The FCC reasonably classified cable modem service as an information service.*

a. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). In 1998, in the *Universal Service Report*, the Commission examined the general question of the proper classification of the service provided by traditional ISPs and concluded that they provide an information service for purposes of the Communications Act. 13 F.C.C.R. at 11,536 ¶ 73. The Commission found that ISPs offer their subscribers a variety of clients and services that "combine computer processing, information provision, and other computer-mediated offerings with data transport." *Ibid.* Examining each of the major applications—"World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others," *id.* at 11,537 ¶ 76 (footnotes omitted)—that are made possible by Internet access service, the Commission concluded that each falls comfortably within the Act's definition of information service. *Id.* at 11,537-11,539 ¶¶ 76-78.

The Commission also found that "[m]ore generally, * * * it would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status" and could fall within distinct legal classifications under the Act. 13 F.C.C.R. at 11,539 ¶ 79. Rather, the Commission concluded, "[t]he service that Internet access providers offer to members of the public is Internet access" itself, which allows for each of those information processing capabilities. *Ibid.* That combined offering, the Commission reasonably found, "is appropriately classed as an 'information service.'" *Id.* at 11,540 ¶ 80.

b. Although the Commission generally concluded in the *Universal Service Report* that ISPs provide an information service, the Commission "express[ed] no view * * * on the applicability of this analysis to cable operators providing Internet access service." 13 F.C.C.R. at 11,535 n.140. In the instant proceeding, however, the Commission found that cable modem service, like other forms of Internet access service, "combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications." Pet. App. 94a. The result is to offer users capabilities involving "[access to unique] content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web." *Id.* at 52a-54a (footnotes omitted); see *id.* at 91-93a. Accordingly, the Commission concluded that, under the analysis in the *Universal Service Report*, cable modem service is an information service.

The court below agreed that cable modem service is, at least in part, an information service. See Pet. App.

14a-15a. So did the parties that challenged the FCC's order in this case. *Id.* at 10a ("None of the petitioners [who sought review in the court of appeals] challenge the FCC's conclusion that cable modem service is an information service.").

2. The FCC reasonably determined that, insofar as cable modem service is an information service, it is not a telecommunications service.

a. In the *Universal Service Report*, the Commission also considered the application to Internet access service of the categories of "telecommunications" and "telecommunications service" under the Act. The Commission recognized that "[b]ecause information services are offered 'via telecommunications,' they necessarily require a transmission component in order for users to access information." 13 F.C.C.R. at 11,529 ¶ 57. The Commission nonetheless reasonably concluded that such use of transmission capabilities does not compel classification of information service providers as providers of telecommunications service.

"Telecommunications" is defined as the "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43). In the *Universal Service Report*, the Commission reasoned that the purpose of the "without change" clause "is to ensure that an entity is *not* deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information." 13 F.C.C.R. at 11,521 ¶ 40. As the Commission explained, whereas an offering of telecommunications necessarily involves the provision of a "transparent" transmission path, *id.* at 11,520 ¶ 39, or

"pure transmission," *id.* at 11,536 ¶ 73, the hallmark of an information service under the Act is that the provider "is by definition not merely transmitting the user's information without change," *id.* at 11,521 n.79.

Because the term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public," 47 U.S.C. 153(46), the Commission concluded in the *Universal Service Report*—consistent with the relevant regulatory and legislative background, see 13 F.C.C.R. at 11,516-11,525 ¶¶ 33-46—that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive." *Id.* at 11,520 ¶ 39; see also *id.* at 11,521, 11,530 ¶¶ 43, 59. Thus, "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.'" *Id.* at 11,520 ¶ 39. But "[b]y contrast, when an entity offers transmission incorporating" the active information-processing capabilities of an information service, "it does not offer telecommunications. Rather, it offers an information service, even though it uses telecommunications to do so." *Ibid.* Because Internet access service incorporates such active, information processing capabilities, the Commission reasonably concluded that Internet access service is not a telecommunications service.

b. In the instant proceeding, the Commission applied that analysis to cable modem service. As with ISPs generally, the Commission recognized that "cable modem service provides the capabilities [of an information service] 'via telecommunications.'" Pet. App. 96a. But, just as with other ISPs, the fact that the cable modem service employs telecommunications does not make it a telecommunications service. Because cable modem service, like the service of other ISPs, offers active, information-processing functionality, the Commission reasonably concluded that "cable modem service as currently provided is an interstate information service." *Id.* at 88a.

3. *The FCC reasonably determined that cable modem service is not a combined offering of distinct information and telecommunications services.*

The court of appeals in *Portland* concluded that cable modem service consists of two distinct services. The court held that "[t]o the extent [the cable operator] is a conventional ISP, its activities are that of an information service," but "to the extent that [the cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." 216 F.3d at 878; see Pet. App. 15a. The Commission reasonably rejected that argument, which relies principally on the fact that a cable modem service provider, unlike some other ISPs, "provides an information service over its own transmission facilities." *Id.* at 97a-98a; see *id.* at 38a (Thomas, J., concurring).

a. As the Commission recognized, the question whether a particular service constitutes a "telecommunications service" under the Communications Act must be resolved by reference to the nature of the provider's "offering * * * to the public," 47 U.S.C. 153(46), and thus the classification "turns on the nature of the functions that the end user is offered." Pet. App. 94a. "As provided to the end user," the "telecommunications component" of cable modem service is not offered "separa[tely] from the data-processing capabilities of the service," but "is part and parcel of" the service being offered. *Id.* at 96a. Thus, "the transmission of in-

formation to and from" the cable operator's "computers may constitute telecommunications," as does the transmission of information in connection with a traditional ISP or other information service. *Id.* at 96a-97a. But, because the cable operator does not *offer* transparent transmission capacity in such a way that the subscriber can use it *without* a corresponding change in the form or content of the information transmitted, the cable operator is not providing a telecommunications service. As the Commission reasonably concluded, "[a]n offering that constitutes a single service from the end user's standpoint" need not be divided into its component parts so as to include a telecommunications service "simply by virtue of the fact that it involves telecommunications components." *Universal Service Report*, 13 F.C.C.R. at 11,529 ¶ 58.

To be sure, if a cable modem service provider made a "stand-alone offering of transmission for a fee directly to the public," Pet. App. 97a, such that subscribers could pay for and use the transmission without the information service capabilities that go along with Internet access service, then such a provider might well be "offering" telecommunications and thus providing a telecommunications service. But the Commission was "not aware of any cable modem service provider that has made [such] a stand-alone offering." *Ibid.* Accordingly, the Commission reasonably determined that, as "currently provided," *id.* at 88a, cable modem service is not a combination of two distinct services.

The Commission also validly concluded that "the fact that cable modem service is provided over the cable operator's own facilities" does not, "without more, necessarily create[] a telecommunications service separate and apart from cable modem service." Pet. App. 98a. The Commission reasonably determined that cable mo-

dem service is properly classified as a "single, integrated information service" for purposes of the Communications Act, with no separate telecommunications service offering to subscribers. *Ibid.*; see *id.* at 95a-96a n.154. Like traditional ISPs, "[t]he cable operator providing cable modem service over its own facilities * * * is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service." *Ibid.*[8] The end user of the service is indifferent to the extent to which an access provider—be it a cable or traditional ISP—is using its own facilities. Nothing in the Communications Act required the Commission to break down that single service into conceptually distinct components for regulatory purposes and

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[8] The Ninth Circuit's conclusion in *Portland* that the transmission component of cable modem service is a separate telecommunications service is based on a flawed analogy between cable modem service and conventional "dial-up" Internet access service. It is true that both "dial-up" service and cable modem service involve telecommunications between the user and the service provider's computers. In "dial-up" service, that telecommunications is provided by the telephone company as part of its "plain old telephone service," while the information service is provided by the ISP; accordingly, there is a distinct "offering" of telecommunications, which constitutes a "telecommunications service." But the *Portland* court erred in assuming that, because the telephone company offers a separate telecommunications service in the case of dial-up Internet access, cable modem operators must also offer a telecommunications service to connect to the Internet. Because cable modem service may reasonably be classified under the Communications Act as "a single information service with Communications and computing components," *Universal Service Report*, 13 F.C.C.R. at 11,530 ¶ 60, there is no "offering" of telecommunications and therefore no "telecommunications service" under the Act. See Pet. App. 95a-96a n.154.

analyze each to determine its proper legal classification under the Act.

b. Judge Thomas in his concurring opinion below contended that the Commission's conclusion is inconsistent with "the full statutory definition" of the terms involved. Pet. App. 30a; see States Opp. 20-21; Earthlink Opp. 14-15. That contention is mistaken. As explained above, the Commission's conclusions were based on a careful examination of the statutory terms and their context. In the first place, the extent to which potentially overlapping statutory terms are mutually exclusive and the proper classification of "mixed" services are precisely the kinds of questions left to the agency under *Chevron*. Cf. *Chevron*, 467 U.S. at 862 (statutory language ambiguous when "the terms are overlapping and the language is not precisely directed to the applicability of a given term in the context of a larger operation"). In any event, the Commission's construction best gives effect to the statutory terms and the "mutually exclusive" nature of telecommunications service and information service, and is therefore "most faithful" to the 1996 Act and its "policy goals of competition, deregulation, and universal service." *Universal Service Report*, 13 F.C.C.R. at 11,530 ¶ 59. Given that the Act's definition of "information service" expressly contemplates a "telecommunications" component, whereas the definition of "telecommunications service" does not similarly contemplate an information service component, the regulatory necessity of placing "offering[s]" in one mutually exclusive category or the other amply justifies the FCC's decision to place "mixed" or "hybrid" services like cable modem service on the information services side of the line. *Id.* at 11,530 ¶¶ 59-60; see Pet. App. 95a-98a.

To be sure, Congress could have framed the Act's definitions in a variety of ways that would have resolved the question in this case. For example, Congress could have enacted an earlier proposed version of the provision that became Section 153(46), under which "telecommunications service" would have included "the transmission, without change in the form or content, of information services and cable services," but not "the offering of those [information or cable] services." See S. Rep. No. 23, 104th Cong., 1st Sess. 79 (1995); see also *id.* at 18. That language, which Congress did *not* adopt, would have strongly supported the Ninth Circuit's conclusion in this case.[9] Similarly, Congress could have written Section 153(46) to define "telecommunications service" as "the offering *as a separate service* of telecommunications for a fee directly to the public." That would likely have mandated the FCC's construction of the statute. Congress, however, took neither path, and it thereby left the ambiguity up to the FCC to resolve.

c. More generally, a statute that applies to entities that offer a service that can be supplied and used separately does not necessarily apply to entities that offer

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[9] In support of the contention that the FCC erred, Judge Thomas's concurring opinion relies (Pet. App. 36a-37a) on a Senate report discussing the version of the bill that contained the language quoted in the text. Congress, however, did not include that language in the 1996 Act's final definition of "telecommunications service." See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974) (deletion of language in congressional bill "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"). Judge Thomas also relied (Pet. App. 36a) on the House committee report, but that report does not contain any discussion of the classification of an integrated Internet access service. See H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1 (1995). In any event, that report, like the Senate report, addressed proposed language that ultimately was not adopted by Congress.

the service only as a component of some other, larger service. Consider, for example, a regulatory statute applicable only to airline service between New York and Chicago, and an airline that offers flights between New York and Los Angeles with a stop in Chicago strictly for refueling and with no opportunity for passengers to exit the plane. The question whether the New York-to-Chicago statutory provision applied to the offering of such coast-to-coast flights would likely turn on the purposes and policies underlying the statute, which might include concerns for limiting passenger traffic in the Chicago airport, easing passenger connections to other flights in Chicago, allocating landing rights in Chicago, or other matters. An agency entrusted with administering such a statute would have the discretion to consider the various policies involved and construe the statute in the manner best calculated to achieve them.

Just as the regulation in the above example is ambiguous in its application to the coast-to-coast air service, the application of the statutory definition of "telecommunications service" to cable modem service contains a similar ambiguity. The transmission of information included in cable modem service occurs *only* in connection with the further processing of the information involved, just as the flight from New York to Chicago occurs *only* in connection with the airlines' offering of New York-to-Los Angeles service. As the Commission recognized, the question whether there is an offering of telecommunications service, just like the question whether there is an offering of air service between New York and Chicago in the example, has no "easy or obvious answer[]." Pet. App. 87a. The Act simply does not "clearly indicate how cable modem service should be classified or regulated." *Ibid.*

This Court recognized in *Gulf Power*, when addressing the very issue of the proper classification of cable modem service under the Communications Act, that Congress left some flexibility in the statutory definitions for the FCC to resolve. As the Court noted, Congress was aware that cable modem service "might be expected to evolve in directions that Congress knew it could not anticipate." *Gulf Power*, 534 U.S. at 339. Congress also knew that "the subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent." *Ibid.* Accordingly, Congress left it to the FCC to resolve the statutory ambiguity regarding the proper classification of cable modem service, in accordance with the Commission's general authority to foster the policies underlying the Act. The Commission's exercise of its delegated authority to resolve that ambiguity should be upheld.

B. The FCC's Conclusion Is Supported By The Policies Of The Communications Act

1. The FCC's conclusion that cable modem service is an information service, not a telecommunications service, is a valid application of the policies of the Communications Act that the Commission is entrusted with interpreting and applying. Congress recognized in the 1996 Act that the Internet was then "flourish[ing]" under "a minimum of government regulation," 47 U.S.C. 230(a)(4), and declared that the Internet should, to the extent possible, remain "unfettered by Federal and State regulation," 47 U.S.C. 230(b)(2). Consistent with that guidance, the Commission has determined that establishing a "minimal regulatory environment" for broadband services will most effectively further the statutorily grounded policy of "encourag[ing] ubiqui-

tous availability of broadband to all Americans." Pet. App. 46a-47a (quoting 1996 Act § 706, 110 Stat. 153). Since the enactment of the 1996 Act, the Commission has therefore continued to take a "hands off" policy toward cable modem service, *Cable Modem NOI*, 15 F.C.C.R. at 19,288 ¶ 4, and the service has thrived during that period. Cable operators have invested billions of dollars in system upgrades that enable them to provide broadband Internet access service to their subscribers.[10] Cable modem service is today the most popular service by which residential consumers obtain high-speed access to the Internet, with 18.6 million cable modem lines in use as of June 2004. Industry Analysis & Technology Div., FCC, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at 2, Table 1 (Dec. 2004).

Regulating cable modem service as a telecommunications service would dramatically alter the regulatory environment that has fostered this investment and growth. Cable operators would have to restructure their pricing of cable modem service to reflect the fact that the telecommunications component of the service must be separated from its other components and be subject to the full panoply of Title II requirements. Cable operators also would have new financial obligations. They would be required to contribute to federal universal service support mechanisms,[11] 47 U.S.C. 254(d), as

[10] See *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 F.C.C.R. 2844, 2871-2872 ¶ 65 (2002).

[11] Telecommunications carriers are required to pay into the universal service program an amount equal to a percentage of their interstate telecommunications revenue. That percentage—known as the "contribution factor"—is adjusted each quarter based on the projected demand for universal service support and the projected revenues that carriers expect to collect from their customers. For the first quarter of 2005, the Commission established a contribution factor of 10.7%. See FCC, *Proposed First Quarter 2005 Universal Service Contribution Factor*, Pub. Notice, DA 04-3902 (rel. Dec. 13, 2004).

well as to other funds that support telephone number portability and telephone relay services for the hearing impaired, see 47 C.F.R. 52.17, 64.604(c)(5)(iii), and they might have to pay higher pole attachment rates for constructing their networks, 47 U.S.C. 224.[12] Cable operators could also be obligated to engineer and operate their cable systems to accommodate interconnection between their cable systems and the networks of telecommunications carriers, 47 U.S.C. 251(a), or provide "open" access to cable facilities. See Pet. App. 62a-63a, 84a-85a (discussing technical hurdles associated with a multiple-ISP access environment). Those heightened regulatory obligations could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas. See *id.* at 103a n.176; see also 04-277 Pet. 19. Imposition of those obligations on cable operators could also discourage investment in facilities by competing Internet access providers. The Commission's decision advances the policies of the Act by avoiding the untoward consequences of respondents' approach.

[12] Owners of utility poles have a right to compensation for pole attachments. In the wake of the court of appeals' decision, they may claim to have the right to charge the generally higher "telecommunications rate" rather than the "cable rate" that applies for attachments carrying "mixed" cable/Internet traffic. See *Gulf Power*, 534 U.S. at 335-339.

2. In his concurring opinion below, Judge Thomas stated his view that applying Title II obligations to cable modem service providers would promote the goals of the Communications Act by "enhanc[ing] independent ISP access to telecommunications facilities." Pet. App. 34a. As this Court held in *Chevron*, however, "[s]uch policy arguments are more properly addressed to legislators or administrators, not to judges" who "are not experts in the field." 467 U.S. at 864-865. The Commission is evaluating in a pending proceeding what federal regulatory obligations, if any, it should impose on cable modem service providers under its regulatory authority. Pet. App. 133a-168a. It is in that forum that the policy debate over issues such as independent ISP access to cable facilities should take place.

C. Respondents' Other Arguments Should Be Rejected

1. Respondents err in suggesting (Brand X Opp. 27; see Earthlink Opp. 29; States Opp. 26) that the Commission's regulatory approach allows cable operators to "escape" common carrier obligations. Those obligations are generally applicable only to providers of telecommunications services. See 47 U.S.C. 153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."). If the Commission permissibly concluded that cable operators do not "offer * * * telecommunications for a fee directly to the public" under 47 U.S.C. 153(46), then there is no question of "escaping" a carrier obligation; cable operators providing cable modem service were not subject to the Act's common carrier obligations in the first place. To be sure, the Commission may require entities not otherwise subject to common carrier obligations to offer common carrier service if "the public

interest requires common carrier operation," such as where an entity has market power. *Virgin Island Tel. Corp.*, 198 F.3d at 925 (citing *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21,585, 21,589 ¶ 9 (1998)). The Commission, however, has not determined that the public interest requires cable modem service providers to make an "offering of telecommunications" indiscriminately to the public. See Pet. App. 97a.[13]

2. Respondents and Judge Thomas have also erroneously asserted (Brand X Opp. 19-22; States Opp. 23-25; Pet. App. 35a- 36a) that the FCC's decision in this case is inconsistent with the Commission's "*Computer II*" regime for regulation of telephone companies engaged in selling data processing services. Beginning in 1966, the Commission initiated a series of proceedings to address "regulatory problems raised by the confluence of communications and data processing." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384, 386 ¶ 2 (1980) (*Computer II Order*), aff'd *sub nom.*

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[13] Relatedly, respondents err in contending that the FCC's classification of cable modem service in some way circumvents the criteria for forbearing from regulating telecommunications services under Section 10 of the Communications Act, 47 U.S.C. 160. See States Opp. 18, 27; Brand X Opp. 30; Earthlink Opp. 29-30. Section 10(a) provides that the Commission "shall forbear" from applying "any provision" of the Communications Act to a telecommunications carrier or a telecommunications service in certain specified circumstances. Section 10 does not speak to the threshold question whether cable modem service should be subject to regulation as a telecommunications service in the first place, such that forbearance would be necessary. Indeed, it would be particularly strange if the existence of Section 10—which Congress enacted to enable the relaxation of Title II's regulatory obligations—were used as a basis for interpreting the Communications Act to compel imposition of Title II obligations on cable modem service.

Computer and Communications Indus. v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). One issue was whether communications common carriers—particularly historical monopoly telephone companies whose networks were at that time essential to the efficient delivery of new computer services—"should be permitted to market data processing services, and if so, what safeguards should be imposed" to protect against anticompetitive or discriminatory practices. *Id.* at 389-390 ¶ 15.

a. In the *Computer II Order*, the FCC distinguished the telephone companies' "basic" services (which are "common carrier offering[s]" of "pure transmission capability," 77 F.C.C. 2d at 419-420 ¶¶ 93, 96) from their "enhanced services" (which are computer processing services "offered over common carrier transmission facilities," *id.* at 498, App. § 64.702(a), and are therefore similar to "information services" under the 1996 Act). Under the *Computer II Order* regime, the AT&T telephone monopoly and its successors could provide enhanced services only through separate affiliates that obtained their transmission capacity through tariffs made available to other enhanced service providers.[14]

[14] In the so-called *Computer III* proceeding, the Commission adopted non-structural safeguards as an alternative to the separate-affiliate requirement in the *Computer II Order*. See, *e.g.*, *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C. 2d 958 (1986), vacated in part *sub nom. California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990) (agency history omitted). Currently, the Bell operating companies and their affiliates are the only common carriers required to provide enhanced services under either the separate-affiliate structure of *Computer II* or the non-structural safeguards adopted in *Computer III*. See generally *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*

Id. at 474 ¶ 229. Other facilities-based common carriers could integrate their common-carrier and enhanced-service offerings, but they also had to offer their self-furnished transmission capacity wholesale to other enhanced service providers on nondiscriminatory terms and conditions.[15] *Id.* at 475 ¶ 231. Under that framework, the Commission limited Title II regulatory obligations to traditional telephone companies' common carrier offerings, while enabling enhanced services to remain free from Title II regulation. See *id.* at 428-435 ¶¶ 114-132.

In the instant order, the Commission concluded that the regulatory framework adopted in the *Computer Inquiries* did not control its classification of Internet access services provided by cable operators. See Pet. App. 100a. The requirements of *Computer II* were imposed on entities that were already providing telephone service as "traditional wireline common carriers," largely on a monopoly basis under the old AT&T regime. *Ibid.* They have been "applied exclusively to traditional wireline services and facilities." *Ibid.* As the Commission had noted in its *Universal Service Report*, such "legacy regulatory frameworks" may not be appropriate for services and technologies related to the Internet, where the structure of the industry and the opportunities for various forms of inter-modal and intra-modal competition are quite different. 13 F.C.C.R. at 11,540 ¶ 82. In particular, unlike the traditional tele-

(*Wireline Broadband NPRM*), 17 F.C.C.R. 3019, 3038-3040 ¶¶ 39-42 (2002).

[15] At the time of the *Computer II Order*, many facilities-based common carriers not affiliated with AT&T were small telephone monopolies that served predominantly rural areas. See *Computer II Order*, 77 F.C.C. 2d at 467-471 ¶¶ 215-224 & Table 1.

phone companies for whom the *Computer II* regime was structured, cable operators providing cable modem service have never been viewed as common carriers, and neither that service nor traditional cable service has ever been viewed as "pure" transmission service that is comparable to the service offered by traditional telephone companies. Accordingly, the Commission acted reasonably in declining "to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act." Pet. App. 101a.[16]

b. Judge Thomas and respondents also appear to contend that Congress codified the requirements of

[16] Rather than expanding the reach of its decades-old *Computer II* regime by applying it to cable operators providing cable modem service, the Commission has instead initiated a proceeding to re-evaluate application of the *Computer Inquiries* regime to broadband services provided by traditional telephone common carriers in light of the "very different legal, technological and market circumstances" associated with broadband technologies and the federal policies of promoting broadband deployment and minimizing regulation of the Internet. *Wireline Broadband NPRM*, 17 F.C.C.R. at 3037 ¶ 35, 3040-3043 ¶¶ 43-53. If there were any tension between the *Computer II* regime and the Commission's decision in the proceeding below, that tension could be analyzed and resolved in the course of the *Wireline Broadband NPRM* proceeding.

Also in keeping with its overall policy goal of "develop[ing] an analytical approach that is * * * consistent across multiple platforms," the Commission is considering whether it should compel cable operators to offer the transmission capabilities they use in connection with their cable modem service to unaffiliated ISPs. See Pet. App. 135a. Especially in conjunction with the *Wireline Broadband NPRM* proceeding, that approach, too, promises to promote consistency in regulation in this area without tying the FCC to legacy regulatory structures developed in another era to address different concerns.

Computer II in the 1996 Act and thereby compelled cable modem service providers to offer a stand-alone transmission service to ISPs. See Pet. App. 35a-36a; States Opp. 23-25. When Congress sought in the 1996 Act to compel access to particular providers' network facilities and services, however, it made those requirements express. See, *e.g.*, 47 U.S.C. 251(b)(1) (obligation to resell telecommunications services), 251(c)(3) (duty to provide unbundled access to network elements), 251(g) (preservation of pre-existing access obligations on local exchange carriers), 259 (infrastructure sharing); see generally *Iowa Utils. Bd.*, 525 U.S. at 371-373 (discussing 1996 Act's network access requirements on local telephone companies). The 1996 Act imposes no similar obligation on information service providers that use their own telecommunications facilities to offer a tariffed transmission service under the framework established in the *Computer Inquiries*, nor does it extend the *Computer II* framework to cable operators providing Internet access service.

In support of their contrary view of the 1996 Act, Judge Thomas and respondents rely heavily on the Commission's statement in the *Universal Service Report* that the Act's definitions of "telecommunications service" and "information service" "build upon frameworks established" in the *Computer II* proceeding. See Pet. App. 36a (Thomas, J., concurring) (citing *Universal Service Report*, 13 F.C.C.R. at 11,511 ¶ 21); see also Brand X Opp. 14 n.45. As the Commission has explained, however, the 1996 Act's statutory term "information service" is broader than the Commission's regulatory term "enhanced service." Although the enhanced services at issue in the *Computer Inquiries* by definition were offered only "over common carrier transmission facilities," information services include

similar services provided "via telecommunications," *i.e.*, over either common-carrier facilities (which necessarily are employed in an offering of telecommunications to the public and therefore necessarily involve telecommunications service), or non-common-carrier (*i.e.*, "private," see note 2, *supra*) telecommunications facilities that have never been subject to *Computer II* requirements. *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21,905, 21,956 ¶¶ 102-103 (1996). The suggestion by Judge Thomas (Pet. App. 31a) and respondents (States Opp. 21 n.8) that the provision of an information service requires an underlying telecommunications *service* component (rather than just telecommunications) ignores that critical distinction.

II. THE NINTH CIRCUIT ERRED IN REFUSING TO REVIEW THE COMMISSION'S CLASSIFICATION OF CABLE MODEM SERVICE UNDER THE *CHEVRON* FRAMEWORK

The court of appeals refused to determine whether the Commission's decision constituted a permissible construction of the Communications Act under *Chevron*. Instead, the court concluded that the outcome here was determined by the *Portland* panel's contrary reading of the Communications Act, even though *Portland* did not "involv[e] potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Portland*, 216 F.3d at 876.

The Ninth Circuit erred in refusing to apply the *Chevron* framework. This Court could opt to leave that error uncorrected, because the merits of the FCC's decision are now squarely before the Court and, whatever the prospective effect of the Ninth Circuit's *Portland* decision in that court, it plainly does not bind this Court in any way. But there is a significant conflict in the circuits concerning the interaction of the *Chevron* doctrine with the rule of *stare decisis*, see 04-281 Pet. 18-23, and the Court may wish to address that issue here. If so, the court should reject the Ninth Circuit's mistaken view that its own precedent predating the agency decision under review automatically precludes adherence to *Chevron*.

1. In *Chevron*, this Court set forth a fundamental principle that governs judicial review of an administrative agency's interpretation of a statute it administers: "If the statute is silent or ambiguous with respect to the specific issue [involved in a particular case], the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. *Chevron* does not contain any exception to that principle for cases in which courts have attempted to resolve the ambiguity without agency guidance, and any such exception would conflict with the rationale that underlies the *Chevron* doctrine. As the Court observed in *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996):

> We accord deference to agencies under *Chevron* * * * because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Where such an ambiguity exists, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statu-

tory ambiguity," so long as the agency has reasonably interpreted the statute. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

In invoking *Portland* to invalidate the Commission's reasonable classification of cable modem service, the court of appeals undermined Congress's intent to delegate to the Commission the power to interpret gaps and ambiguities in the communications laws. *Iowa Utils Bd.*, 525 U.S. at 397. The Ninth Circuit rule also creates perverse disincentives for the kind of careful, deliberate agency decisionmaking the FCC engaged in here. If the FCC had resolved the cable modem issue precipitously in the 1998 *Universal Service Report*, the *Portland* court would have deferred to that judgment. Such incentives for rash agency judgments would be particularly costly in dealing with a new and fast-moving technology like the Internet.

As Judge O'Scannlain emphasized, the court of appeals' rationale for refusing to apply *Chevron* would "append[] a subversive codicil to *Chevron*'s rule"—that agency interpretations of ambiguous statutes are entitled to deference "unless the courts take it first." Pet. App. 24a (quoting Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1273 (2002) (internal punctuation and cross-reference omitted)); cf. *Stinson* v. *United States*, 508 U.S. 36, 46 (1993) (agencies' interpretations of their own rules bind the courts even if they conflict with prior judicial constructions of the rules). The deference principle enunciated in *Chevron* should not be eviscerated in that manner.

2. The Ninth Circuit attempted (Pet. App. 20a-21a) to justify its rule by citing *Neal* v. *United States*, 516 U.S. 284 (1996). Regardless of the precise extent of the principle set forth in *Neal*, however, that case provides

no justification for the rule applied by the court of appeals below.

a. In *Neal*, this Court stated that the United States Sentencing Commission would not be entitled to deference for its interpretation of 21 U.S.C. 841(b)(1), because this Court had itself already reached a conclusion about what that statute "requires" in *Chapman* v. *United States*, 500 U.S. 453 (1991). See 516 U.S. at 295. The court stated that "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Ibid.*

The best reading of *Neal* is that the Court was merely stating the rule applicable when a court has already concluded that Congress itself has "directly spoken to the precise question at issue" and has left no room for the agency's construction (*i.e.*, when the prior decision makes clear that it is a *Chevron* "step-one" case). *Chevron*, 467 U.S. at 842. In *Neal* itself, the Court referred to its prior ruling in *Chapman* as a determination of what the statute at issue "requires." 516 U.S. at 293. And in *Chapman*, the Court had found the alternative reading of the statute "not plausible," 500 U.S. at 459, and had declined to apply the rule of lenity because the statute was not ambiguous, *id.* at 463-464. Thus, the best reading of the Court's statement in *Neal* is that it was limited to cases in which the statute at issue has already been judicially declared to have only one permissible interpretation.

That reading is confirmed by the two cases cited by the *Neal* Court in support of its refusal to defer, see 516 U.S. at 295; in both cases the Court's prior precedent had already stated the clear and unambiguous meaning of a statute, thus justifying the invocation of stare de-

cisis to overturn an intervening agency decision. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537 (1992) (noting that, when the Court in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), reversed the NLRB's interpretation of the National Labor Relations Act, it was "saying, in *Chevron* terms, that [the statute] speaks to the issue"); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130, 135 (1990) (holding that, by permitting conduct that "[f]or a century" the Court had held to violate the filed-rate doctrine, "the ICC has permitted the very price discrimination that the Act *by its terms* seeks to prevent") (emphasis added). There is nothing in *Neal* to suggest that the Court intended to develop a rule that would be more expansive than the one applied in those prior cases, nor would there be any basis for such a rule in light of the important considerations of policy and respect for the coordinate Branches that undergird the Court's decision in *Chevron*.

b. In any event, whatever stare decisis principle governs this Court's prior statutory constructions in light of this Court's unique role as the final arbiter of the meaning of federal statutes on a nationwide basis, there would be no justification for the court of appeals' elevation of its own precedent over the principles enunciated by this Court in *Chevron*. The principle that third parties should be able to rely on the legal norms announced in a judicial decision, see *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), has far less force in the context of a circuit court decision, which might be subject to disagreement among the circuits and correction by a subsequent decision of this Court.

Adoption of a no-deference rule in the court of appeals would, moreover, have harmful consequences that would not follow if such a rule applied solely to this Court's prior decisions. As the Eleventh Circuit recog-

nized, a no-deference rule like the one adopted in the Ninth Circuit "illogically would wed [a circuit] to [its precedent] while all other circuits and the Supreme Court would be bound under *Chevron* to defer" to an agency's reasonable construction. *Satellite Broad. & Communications Ass'n of Am.* v. *Oman*, 17 F.3d 344, 348, cert. denied, 513 U.S. 823 (1994). Unlike the Ninth Circuit's rule, treating this Court's precedent as conclusive despite statutory ambiguity would not have a similar effect of setting the circuits on divergent paths and permitting the nationwide effect of a statute, in a case like this one, to be determined by the happenstance of a judicial lottery. Nor would a no-deference rule in this Court similarly encourage parties to "jump the gun" on the agency and obtain an early judicial ruling that would "freeze" the legal rule before the agency had the opportunity to act; no party could assure itself of early review in this Court, which frequently depends in any event on the development of a conflict in the circuits. And according a different *stare decisis* effect to this Court's precedents would also minimize the incentive for parties challenging an agency decision to forum-shop to obtain review of the decision in a circuit that had already taken a favorable position on the statutory question at issue before the agency reached its conclusion. See generally, *e.g.*, 28 U.S.C. 2343 (allowing a petitioner to challenge FCC rulemaking decisions either in the D.C. Circuit or in "the judicial circuit in which the petitioner resides or has its principal office").

3. No prior decision of this Court decided the classification of cable modem service under the Communications Act. Accordingly, this Court is not here presented with the question whether its own determination of the preferred interpretation of an ambiguous

statute would preclude an agency from reaching a different conclusion about the meaning of the same statute. But the Court should reject the Ninth Circuit's rule that a construction of an ambiguous statute by a court of appeals precludes according *Chevron* deference to a later construction of the same statute by the agency. Before the agency has acted, the legal question before the court of appeals is simply how best to resolve the statutory ambiguity. After the agency has interpreted the statute, however, the legal question before the court of appeals is whether the agency, to which Congress has delegated the authority to construe the statute, has adopted a permissible view. This Court is familiar with legal rules that accord no binding effect to prior decisions on an issue, when the issue comes before the same court later under a different legal standard. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam) ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."); *Dowling* v. *United States*, 493 U.S. 342, 349 (1990) (same). The same principle should govern in this context, especially where the effect of adopting the opposite rule would be to nullify Congress's delegation of primary authority to the agency—not the courts—to resolve the statutory ambiguity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

R. HEWITT PATE
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

MAKAN DELRAHIM
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
Attorneys

JOHN A. ROGOVIN
General Counsel

AUSTIN C. SCHLICK
Deputy General Counsel

DANIEL M. ARMSTRONG

JACOB M. LEWIS
Associate General Counsel

NANDAN M. JOSHI
Counsel
Federal Communications Commission

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